

**67 FLRA No. 107**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1923  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE NAVY  
NAVAL FACILITIES ENGINEERING COMMAND  
(NAVFAC WASHINGTON)  
(Agency)

0-AR-4907

DECISION

May 8, 2014

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

Arbitrator Paul Greenberg concluded that certain Agency employees were exempt from coverage of the Fair Labor Standards Act<sup>1</sup> (the FLSA). We must determine two substantive questions.

First, we must determine whether the Arbitrator's award is based on a nonfact because the Agency failed to produce evidence that it made an "affirmative determination" that the grievants were FLSA-exempt.<sup>2</sup> We find that the award is not based on a nonfact because the Union has failed to demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result.

Second, we must determine whether the award is contrary to law because the Agency failed to prove that it made a "determination" that the grievants were FLSA-exempt for purposes of the Office of Personnel Management's regulations implementing the FLSA for federal employees (OPM's regulations).<sup>3</sup> We find that the award is not contrary to law because the Union has

failed to demonstrate that the award is contrary to OPM's regulations.

**II. Background and Arbitrator's Award**

The grievants are contract specialists (specialists) who are responsible for awarding and administering contracts on behalf of the U.S. Navy. Though the specialists' standard form (SF)-50s indicate that their positions are nonexempt, the Agency designated and treated the specialists as exempt from FLSA coverage since at least 2005.

The Union filed a grievance contesting the Agency's treatment of the specialists as FLSA-exempt. The grievance was unresolved, and the parties proceeded to arbitration.

The parties submitted the following issue to the Arbitrator: "[w]hether [the Agency] properly has classified the [specialists] as 'exempt' under the [FLSA.]"<sup>4</sup> The Arbitrator found that the Agency had deemed the specialists to be FLSA-exempt for approximately eight years. According to the Arbitrator, it logically followed that "*someone* in a position of authority" had made a determination that the specialists were exempt, as required by OPM's regulations.<sup>5</sup> Specifically, 5 C.F.R. § 551.201 provides that an agency "must review and make a determination on each employee's exemption status."<sup>6</sup> Section 551.202 provides, in pertinent part, that an "employee is presumed to be FLSA[-]nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions [contained in the regulation]."<sup>7</sup> It further provides that when an agency "correctly determines that [an] employee clearly meets the requirements of one or more of [those] exemptions," the "agency must designate [the] employee FLSA[-]exempt."<sup>8</sup>

The Arbitrator reasoned that, while 5 C.F.R. § 551.202(a) "suggests"<sup>9</sup> that an agency must determine that an employee is FLSA-exempt before it can exempt that individual, neither OPM's regulations nor the FLSA prescribes any particular process by which an agency must make that determination. Thus, the Arbitrator rejected the Union's claim that the Agency's determination of the specialists' FLSA-exempt status was deficient because "the Agency did not introduce evidence describing the process that [it] used" to make that

<sup>1</sup> 29 U.S.C. §§ 201-219.

<sup>2</sup> Exceptions at 7.

<sup>3</sup> See 5 C.F.R. § 551.201-202.

<sup>4</sup> Award at 2.

<sup>5</sup> *Id.* at 14.

<sup>6</sup> 5 C.F.R. § 551.201.

<sup>7</sup> 5 C.F.R. § 551.202(a).

<sup>8</sup> *Id.*

<sup>9</sup> Award at 13.

determination.<sup>10</sup> Based on his evaluation of their actual duties, the Arbitrator concluded that the Agency properly excluded the specialists from FLSA coverage because they are administrative employees within the meaning of OPM's regulations.

The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

### III. Analysis and Conclusions

#### A. The award is not based on a nonfact.

The Union argues that the award is based on a nonfact because the Arbitrator "assumed a fact not in the record," namely, that the Agency made a determination that the specialists were FLSA-exempt.<sup>11</sup> According to the Union, there was no evidence in the record that "the [A]gency accomplished a positive FLSA determination."<sup>12</sup> To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.<sup>13</sup>

Here, the Arbitrator made a factual finding, based on his evaluation of the evidence, that the Agency made a determination that the specialists were FLSA-exempt.<sup>14</sup> Relying on the parties' "pre-hearing and post-hearing statements," the Arbitrator "conclude[d] that the Agency's *determination* [of the specialists' FLSA-exempt status] is not deficient."<sup>15</sup> The Union's nonfact exception is based on a claim that this factual finding was not sufficiently supported.<sup>16</sup> Such claims do not demonstrate that a central fact underlying the award is clearly erroneous, but for which the Arbitrator would have reached a different result.<sup>17</sup> Accordingly, we deny the Union's nonfact exception.

#### B. The award is not contrary to law.

The Union also asserts that the award is contrary to law.<sup>18</sup> When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award *de novo*.<sup>19</sup> In applying the standard of *de novo* review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.<sup>20</sup> In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.<sup>21</sup>

The Union claims that the award is contrary to 5 C.F.R. §§ 551.201 and 551.202 because the Arbitrator did not find that the Agency made an "affirmative determination" that the specialists' positions are FLSA-exempt.<sup>22</sup> However, neither the plain language of §§ 551.201 and 551.202 nor the case law supports the Union's contention that the Agency "must prove with facts, evidence, documents and testimony that [it] accomplished" what the Union calls "a positive FLSA determination."<sup>23</sup>

OPM's regulations provide only that an agency must: (1) "review and make a determination on each employee's exemption status;"<sup>24</sup> and (2) "designate an employee FLSA[-]exempt when the agency correctly determines that the employee meets the requirements" for exemption provided in the regulations.<sup>25</sup> They make no mention of any process by which an Agency must make a FLSA determination.

The Union also claims that *AFGE v. OPM*<sup>26</sup> requires an agency to present evidence that it made an "affirmative determination" of each employee's FLSA-exempt or FLSA-nonexempt status.<sup>27</sup> But the Union mischaracterizes the holding in that case. In *AFGE v. OPM*, the U.S. Court of Appeals for the D.C. Circuit did not consider whether an employee was properly classified as FLSA-exempt. Rather, the issue before the court was whether an OPM regulation

<sup>10</sup> *Id.* at 14.

<sup>11</sup> Exceptions at 8.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *E.g., NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 461 (2012) (citation omitted).

<sup>14</sup> Award at 14.

<sup>15</sup> *Id.* n.3 (emphasis added).

<sup>16</sup> See Exceptions at 5-8.

<sup>17</sup> *Pension Benefit Guar. Corp.*, 64 FLRA 692, 696 (2010); see also *U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (claim that "no evidence has been presented" to support alleged factual finding did not demonstrate that a central fact underlying the award was clearly erroneous, but for which arbitrator would have reached a different result); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999) (noting agency argument that "[n]o evidence" supported finding, and holding

that an "absence of facts" does not demonstrate that award is based on nonfact).

<sup>18</sup> See Exceptions at 5, 9-11.

<sup>19</sup> *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006).

<sup>20</sup> *E.g., id.*

<sup>21</sup> *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012).

<sup>22</sup> Exceptions at 10.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> 5 C.F.R. § 551.201.

<sup>25</sup> *Id.* § 551.202(a).

<sup>26</sup> 821 F.2d 761 (D.C. Cir. 1987).

<sup>27</sup> Exceptions at 10.

providing that all employees graded General Schedule (GS)-11 and higher were presumed to be FLSA-exempt was inconsistent with the principles of the FLSA. The case has no bearing on whether an agency must present evidence of its internal process with respect to making FLSA determinations.

Here, the Arbitrator concluded that the Agency satisfied the requirements of OPM's regulations. Specifically, he made a factual finding that the Agency determined that the specialists' positions were FLSA-exempt. The Union has not established that this finding is deficient as a nonfact. And, after examining the evidence before him, the Arbitrator concluded that the Agency's determination regarding the specialists' FLSA-exempt status was correct.<sup>28</sup> We therefore find that the Union has failed to demonstrate that the award is contrary to OPM's regulations, and we deny the Union's contrary-to-law exception.

#### **IV. Decision**

We deny the Union's exceptions.

---

<sup>28</sup> See Award at 14.